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**State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

ROBERT PLAYFAIR,

Petitioner,

v.

CITY OF CHEWELAH,

Respondent.

Case No. 04-1-0009

FINAL DECISION AND ORDER

I. SYNOPSIS

A Petition for review was filed on July 22, 2004 by Mr. Robert Playfair asking for review of the City of Chewelah's Public Participation Program. The Petitioner is claiming the City did not properly establish and broadly disseminate to the public its Public Participation Program and the Public Participation Program itself was not adequate.

The Petitioner claims the City erred in several sections of the Public Participation Program especially in the use of words that were not mandatory and options that should be requirements. The Respondent contends the Public Participation Program complied with the GMA and provided for more than adequate public participation and the Petitioner did not carry his burden of proof.

The Board finds for the most part the City of Chewelah has done well in its adoption of the Public Participation Program. However, the Board finds the Petitioner has carried his burden in places where it is necessary to use mandatory language and where several of the optional sections need to be moved to the requirement sections. These changes will be of no great expense to the City and will allow the public to participate more in the process as is required by the GMA.

1 Issue No. 4, was not briefed by the Petitioner and is deemed abandoned.

2 II. PROCEDURAL HISTORY

3 On July 22, 2004, ROBERT PLAYFAIR, by and through his attorney, Steven Graham,
4 filed a Petition for Review.

5 On August 17, 2004, the Board received from Petitioners' attorney, Steven Graham a
6 Motion for Order Prohibiting Multiple Attorneys, and Memorandum in Support thereof, Order
7 Prohibiting Multiple Attorneys (Proposed), and Petitioners Objections to Respondent's Index
and Chronological statement, and Motion to Strike and Motion to Compel.

8 On August 19, 2004, the Board received Notice of Association of Council from Stanley
9 Schwartz.

10 On August 19, 2004, the Board held a telephonic Prehearing conference. Present was
11 Judy Wall, The Presiding Officer, and Board Member Dennis Dellwo. Board Member D.E.
12 "Skip" Chilberg was unavailable. Present for Petitioners was Steven Graham. Present for
13 Respondent was Patrick Monasmith and Associated council Stanley Schwartz.

14 On August 27, 2004, the Board issued its Prehearing Order.

15 On August 30, 2004, the Board received Petitioner's Amended Statement of Issues.

16 On September 9, 2004, the Board received Respondent City of Chewelah's Motion for
Summary Judgment and Memorandum in Support of Motion for Summary Judgment.

17 On September 24, 2004, the Board received Petitioner's Response to City of
18 Chewelah's Motion for Summary Judgment.

19 On September 30, 2004, the Board received Respondent City of Chewelah's Reply
20 Memorandum in Support of Motion for Summary Judgment.

21 On October 4, 2004, the Board held a telephonic Motion Hearing. Present were Judy
22 Wall, Presiding Officer, and Board Members John Roskelley and Dennis Dellwo. Present for
23 Petitioner was Steven Graham. Present for Respondent was Patrick Monasmith and
24 Associated council Stanley Schwartz.

25 On October 11, 2004, the Board issued its Order on Motions dismissing Issues Nos. 2
26 and 3 from the Petition for Review.

1 On November 19, 2004, The Board held the Hearing on the Merits in Chewelah.
2 Present were Judy Wall, Presiding Officer, and Board Members Dennis Dellwo and John
3 Roskelley. Present for Petitioner was Steven Graham. Present for Respondent was Stanley
4 Schwartz.

5 **III. ISSUES PRESENTED**

6 **Issue 1:** Did the City of Chewelah enact a Public Participation Plan that comports with
7 RCW 36.70A.040? That is to ask did the City establish and broadly disseminate to the public
8 a public participation program that identified procedures for early and continuous public
9 participation in the development and amendments of comp plans and development
10 regulations? And, does this plan provide for broad dissemination of proposals and
alternatives, opportunity for written comment, public meetings after effective notice,
provision for open discussion, communication programs, information services, and
consideration of and response to public comment?

11 **Issue 4:** Did the City of Chewelah err by enacting the Public Participation Plan without
12 public participation or other requirements as required by RCW 36.70A.040? That is to ask,
13 did the City err by not broadly disseminating proposals and alternatives, by not providing
14 sufficient opportunity for written comments, by not holding public meetings after effective
notice by not making provisions for open discussion, communication programs, information
services, and consideration and response to public comments?

15 **IV. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF** 16 **REVIEW**

17 Comprehensive plans and development regulations (and amendments thereto)
18 adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon
19 adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners to
20 demonstrate that any action taken by the respondent jurisdiction is not in compliance with
21 the Act.

22 The Board will grant deference to counties and cities in how they plan under Growth
23 Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated, "local discretion is
24 bounded, however, by the goals and requirements of the GMA." *King County v. Central*
25 *Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.2d 133
26 (2000). It has been further recognized that "[c]onsistent with *King County*, and

1 notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly
2 when it foregoes deference to a . . . plan that is not 'consistent with the requirements and
3 goals of the GMA." *Thurston County v. Cooper Point Association*, 108 Wn.App. 429, 444, 31
4 P.3d 28 (2001).

5 Pursuant to RCW 36.70A.320(3) we "shall find compliance unless [we] determine
6 that the action by [Jefferson County] is clearly erroneous in view of the entire record before
7 the Board and in light of the goals and requirements of [the GMA]." In order to find the
8 City's action clearly erroneous, we must be "left with the firm and definite conviction that a
9 mistake has been made." *Department of Ecology v. Public Utility Dist. 1*, 121 Wn.2d 179,
201, 849 P.2d 646 (1993).

10 The Board has jurisdiction over the subject matter of the Petition for Review. RCW
11 36.70A.280(1)(a).

12 IV. FINDINGS OF FACT

- 13 1. The Petitioner, Robert Playfair, timely filed a Petition for review on July
14 22, 2004.
- 15 2. The City of Chewelah adopted its Public Participation Program by
16 Resolution No. 04-02 on May 5, 2004.
- 17 3. The City of Chewelah's Public Participation Program, in places does not
18 use language strong enough in required sections, i.e. the words
19 "should" and "may" instead of the word "shall".
- 20 4. The City of Chewelah's Public Participation Program has failed to meet
21 the broadly dissemination element in RCW 36.70A.140 in several places
22 where options need to be requirements.
- 23 5. The City of Chewelah in section 18.20.040 of its municipal code
24 requires the City to provide notice of application by publication in the
25 official City newspaper.

6. The City of Chewelah's municipal code also requires that the City mail notice to all property owners within 300 feet, and have a sign posted on property for site-specific proposals.
7. The City of Chewelah's Public Participation Program in Policy B requires that notice for meetings and hearings be posted, at a minimum, at City Hall, American West Bank, Chewelah Post office, and on the City's website.
8. The City of Chewelah's Public Participation Program in Policy C, only as an option, allows the following, "posting on Chewelah's World Wide Web Internet site, Mailings to the compiled list of interested parties, media release, and Notices in community newsletters as appropriate or available."
9. The City of Chewelah's Public Participation Program requires the City to hold one public hearing before making a quasi-judicial or legislative decision.
10. The City of Chewelah's Public Participation Program Policy D allows for public testimony and, if the City Council or Planning Commission considers a change to a proposal after the review and comment period has passed, it provides for a second public review and comment period on the proposed change.
11. In Policy D, only as an option, the program states all persons desiring to participate should be allowed to do so.
12. The City of Chewelah's Public Participation Program Policy E, only as an option, allows the chair or facilitator to announce the deadline for submitting written comments, if allowed subsequent to the meeting or hearing.
13. The City of Chewelah's Public Participation Program requires the City to consider all public comments. In addition, public testimony summaries

1 of meetings and hearings will be prepared for the public to review in
2 several ways.

3 **V. DISCUSSION AND ANALYSIS**

4 Issues No. 2 and No. 3 were dismissed by Order on Motions dated October 11, 2004.
5 Issue # 4, has not been briefed by the Petitioner and is deemed abandoned. Issue No. 1 is
6 discussed below.

7 **The Facts and the Parties' Positions:**

8 The Petitioner contends the City erred in the enactment of its Public Participation
9 Plan, as it fails to establish and broadly disseminate to the public a public participation
10 program that identifies procedures for early and continuous public participation in the
11 development and amendment of comprehensive plans and development regulations
12 pursuant to RCW 36.70A.140. The Petitioner believes, if the City deviates from the
13 guidelines set in this policy, there should be criteria in place for such an action. The
Respondent did not respond to this particular portion of the issue.

14 The Petitioner claims the City chose to use words that are not mandatory in meaning
15 for the requirements and some of the options should be requirements in many of the
16 policies. The City contends they have the option for what mandatory words they use in the
17 required sections, as the meaning behind words such as "should" and "may" is that their
18 actions are required. The City further states they have met the minimum requirements and
the options are innovating techniques, which will most likely be used often.

19 **Discussion:**

20 RCW 36.70A.140 in part states:

21 Each city that is required or chooses to plan under RCW 36.70A.040 shall
22 establish and broadly disseminate to the public a public participation
23 program.... The procedures shall provide for broad dissemination of proposals
24 and alternatives, opportunity for written comments, public meetings after
25 effective notice, provision for open discussion, communication programs,
information services, and consideration of and response to public comments
(emphasis added).

1 The Board finds the City did well with most of the language, but finds there are
2 places where mandatory language is required to fulfill the requirements of RCW
3 36.70A.140. The three Growth Boards have repeatedly said that if a plan or policy is a
4 requirement then the language used for what that policy will require, has to have
5 mandatory language such as the words "shall" and "will". Where the City listed requirement
6 words, such as "should" and "may", they are at times not strong enough. "Use of the word
7 should in a plan does not create a GMA duty; on the contrary, it provides for non-
8 compulsory guidance, and establishes that a jurisdiction has some discretion in making
9 decisions.] [Green Valley, 8308c FDO, at 11. CPSGMHB]."

10 As stated above, the public participation process needs to establish and broadly
11 disseminate, to the public, a program identifying procedures providing for early and
12 continuous participation.

13 Policy A, Requirement #1 of the City's Public Participation Program reads, "Compiling
14 an ongoing list of parties interested in GMA and local planning issues." The City's
15 requirement of collecting this list of names from meetings and hearing sign-in sheets,
16 written correspondence and known community groups is not good enough. Unless a person
17 is part of a group, has gone to a meeting or written a letter, they would not have any
18 knowledge of what was going on. The City has a duty to reach out to all of the public that
19 are interested. The City must actively involve people in addition by giving notice in the
20 newspaper, posting on the website and using other techniques available to the City to
21 encourage the public to be involved.

22 In Policy A, Option #3, which reads as follows:

23 Post local planning information, meeting and hearing notices, summaries and
24 documents on the City Website, and;

25 Option #4, which reads as follows:

26 Issue press releases and public service announcements to inform the public
about GMA, local planning, availability of documents, meeting and hearing
dates.

1 By moving Options 3 and 4 above to the Requirement section, the City would meet
2 the broadly disseminate element and doesn't harm the City.

3 In Policy B, the Petitioner believes the City has failed to require the record be
4 available to the public in enough places; the Petitioner believes the public should not have
5 to pay for reproduction; and that the notices to the public do not meet the requirements of
6 the Law. The Respondent claims the record is available to the public at City Hall for review
7 and may be viewed on its website. The Public may purchase a copy of the record for the
8 cost of reproduction. The description of Policy B states as follows: "Chewelah will distribute
9 documents so that they are readily available in a timely fashion to all who want to review
10 them." The next sentence states in part, "these documents should be readily available."
11 Again, since this is a requirement, the word "should" needs to be changed to "shall".

12 The Board finds having the Record available for review at City Hall and charging a
13 fee for the cost of reproducing the minutes or summaries is appropriate. Most local
14 government entities do charge for the cost of reproduction. The Board has no authority to
15 tell the City they may not charge for that service. Again the statutory requirement to
16 broadly disseminate is what the challenge is here. Posting the record on the website is also
17 a common practice today. Today most folks have access to the internet and those that
18 don't, may use the public library.

19 The Board finds the City, by posting the notice of meetings and hearings at City Hall,
20 American West Bank, the Chewelah Post Office and on the Chewelah Website, has met the
21 goals of the Act.

22 The City's Public Participation Program requires the City follow the City Municipal
23 Code by publishing a notice of application in the official City newspaper, mailing a notice to
24 all property owners within 300 feet of application, and posting a sign on the property for
25 site-specific proposals. The Board finds this is proper notice and meets the goals of the Act.
26 The Board encourages the City to specify a standard size for the sign being posted on the

1 property (i.e. 32 square feet in commercial areas), so that it is uniform for all postings and
2 the public is apprised of its size.

3 In Policy C, the Petitioner claims the public participation process fails in that it only
4 requires one public hearing before making a decision and there is little or no chance for
5 public input. The City of Chewelah's Public Participation Program requires the City to hold at
6 least one public hearing before making a quasi-judicial or legislative decision. The City also
7 welcomes the public to take part and have their issues heard. The public participation
8 process provides for written comment, with a notice at the meetings or hearings giving the
9 public a name and address of where written comments might be sent and the deadline for
10 said comments. The process also allows for a second hearing, if the planning commission or
11 the City of Chewelah makes a different determination after hearing public input. The goals
12 of the Act are guidelines for cities and counties. The City of Chewelah has worked to meet
13 the minimum guidelines on this point and the Board must allow deference to the City. The
Board finds this meets the minimum guidelines.

14 Policy C reads as follows:

15 Chewelah will publicize public meetings and hearings to ensure that the
16 broadest cross-section of the community is made aware of the opportunities
to become involved in the planning process.

17 The same issue of the statutory requirement to broadly disseminate is being argued
18 here. The requirements list in the City's Public Participation Program, Policy C is as follows:

19 1) At least one public hearing will be held before making a quasi-judicial
20 or legislative decision.

21 2) The City of Chewelah shall conform to Section 18.30.040 of the
22 Chewelah Municipal Code (CMC) and applicable statutes governing public
meeting and hearing notification.

23 3) Notice of public hearings being published in the official City newspaper
24 of general circulation, not less than 14 days nor more than 30 days before the
25 scheduled hearing date.

1 4) Sign-in sheets shall be used at each meeting to develop a specific
2 mailing list for the workgroup itself, as well as adding to the compiled list of
3 parties interested in GMA and local planning issues. Meeting summaries shall
be prepared and available upon request as soon as possible after the meeting.

4 In Policy B, the City required notification similar to those in Option #6 of Policy C.
5 The Board finds the City needs to follow the same example here and move Option #6 to the
6 requirement section, which reads as follows:

7 The specifics of the proposal may dictate the best notification technique or
8 combination of techniques to be used. Notification techniques may include the
following:

- 9 ❖ Posting on Chewelah's World Wide Web Internet site
- 10 ❖ Mailings to the compiled list of interested parties
- 11 ❖ Media release
- 12 ❖ Notices in community newsletters as appropriate or available

13
14 Option #7, in pertinent part, reads as follows:

15 The City may publish notice of public meetings when appropriate. When
16 notice of public meetings is published it should be advertised at least 10 days
before the scheduled date.

17 The "may" in the sentence needs to be "shall".

18 In Policy D, the language is again the issue. Policy D reads as follows:

19 Chewelah will ensure that public meetings allow for an open discussion of the
20 relevant issues and that hearings allow for appropriate public testimony.

21 Requirement # 2 reads as follows:

22 The scheduled date, time and place should be convenient to encourage the
23 greatest number of people to attend.

24 As this is a requirement, the place for a meeting and time/date need to be a high priority.

25 The word "should" needs to be changed to "shall"

26 Option #8 reads as follows:

1 All persons desiring to participate should be allowed to do so. However,
2 specific factors, such as the purpose of the meeting, size of attendance, time
3 factors, or other opportunities to participate, may suggest some appropriate
4 constraints to be applied. Rules of order for the meeting or hearing should be
5 set forth clearly by the chair or facilitator.

6 Allowing people to participate is not an option. If the time factor or other
7 opportunities hinder a person from participating, there needs to be an option for written
8 comments or a continuance of the meeting to allow more time. Rules of order being set
9 forth clearly by the chair or facilitator are also not an option. The whole purpose and
10 responsibility of a chair or facilitator is to assure that the meeting is run smoothly and that
11 all in attendance have the important information, whether by being announced by the chair
12 or facilitator or in written form. This is not just common sense, it is the core of public
13 participation. The two words, "should", in this option, need to be changed to "shall" and this
14 option needs to become a requirement.

15 Policy E in the second paragraph, reads as follows:

16 In many instances, detailed, technical, or personal comments can be best
17 expressed and understood in written format. The following steps should be
18 taken to encourage written comments.

19 The word "should" needs to be changed to "shall". Policy E uses the words "should"
20 and "may" when talking about a requirement. Those words are not mandatory and need to
21 be changed to "shall".

22 Requirement #1 reads as follows:

23 As appropriate, notices for meetings and hearings should include the name
24 and address of the person(s) to whom written comments should be sent,
25 along with the deadline for submitting comments.

26 The words "should" both need to be changed to "shall".

Requirement #2 reads as follows:

Innovative techniques, as appropriate to a specific planning task, should be
developed and implemented to solicit and document the public's concerns,
suggestions, or visions for the community. Techniques may include, but are

1 not limited to, surveys, interactive displays, or the innovative use of electronic
2 communication technologies.

3 The word "should" needs to be changed to "shall" or "will".

4 Option #3 reads as follows:

5 The deadline for submitting written comments, if allowed subsequent to a
6 meeting or hearing, needs to be clearly announced by the facilitator or chair.

7 This is also not an option. It is the duty of the facilitator or chair to clearly announce
8 all pertinent and important information to the people at meetings or hearings. Again, this is
9 just common sense. The Board finds this option needs to be moved to the requirement
10 section, and the word "should" needs to be changed to "shall".

11 **Conclusion:**

12 The Board finds, for the most part, the City of Chewelah's Public Participation
13 Program is in compliance with the act. However, the Board finds the Petitioner has met
14 their burden of proof and the City needs some language changed to give a mandatory
15 meaning for the requirements they have laid out. The Board also finds the Petitioner has
16 met their burden of proof and several of the optional pieces of this program need to be
17 moved to the requirement section.

18 All noncompliant issues are addressed by Policy in Section 3 as follows:

19 The Board finds in Section 3, Policy A: Public Participation Guidelines, criteria needs
20 to be in place, if the City deviates from Policy A. The Board also finds that Option #3 and
21 Option #4 need to be moved to the requirement section.

22 The Board finds in Policy B: Broad dissemination of proposals and alternatives, the
23 first use of the word "should" in line #2, needs to be changed to "shall". The second use of
24 the word "should" is appropriate. In Policy B, the Board suggests the City require all the
25 signs posted be a standard size and state what size that will be.
26

1 The Board finds in Policy C: Public meetings after effective notice, Option # 6, be
2 made a requirement or written as a requirement similar to Policy B(3). Regarding Option
3 #7, the word "may" in the first sentence needs to be changed to "shall".

4 The Board finds in Policy D: Provision for open discussion, Requirement # 1, both
5 uses of the word "may" need to be changed to "shall" and, in Requirement #2, the word
6 "should" needs to be changed to "shall". In Option #8, the word "should" in the first line
7 needs to be changed to "shall". The Board also finds that allowing the public to participate
8 is not an option. Option #8 needs to be moved to the requirement section.

9 The Board finds in Policy E: Opportunity for written comments, in the paragraph
10 above the required section, the word "should" needs to be changed to "shall". In
11 Requirement #1, the two uses of the word "should" need to be changed to "shall". In
12 Requirement #2, the word "should" needs to be changed to "shall" and the word "may"
13 needs to be changed to either "shall" or "will". Option #3, needs to be moved to the
14 requirement section. The word "should", in line 2, needs to be changed to "shall".

15 The Board finds Policy F meets the requirements of GMA.

16 The Board finds the matrix must be changed to match the changes required above.
17 Matrix D.6 was not briefed, but needs to be moved to a requirement, as civility on the part
18 of a facilitator or chairperson is not an option.

19 VI. CONCLUSIONS OF LAW

- 20 A. The Board has jurisdiction over the parties and subject matter in this
21 case.
- 22 B. The Petitioner has standing to challenge the City of Chewelah's Public
23 Participation Program.
- 24 C. RCW 36.70A.140 not only requires the City of Chewelah to adopt a
25 public participation program, but the procedures in the program shall
26 provide for broad dissemination of proposals and alternatives,
opportunity for written comments, public meetings after effective
notice, provision for open discussion, communication programs,
information services, and consideration of and response to public
comments.

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- D. The City of Chewelah's Program failed in several areas by not using mandatory language in requirements and several options must be moved to the requirement section to meet the goals of the GMA.

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VII. ORDER

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1. The Board finds the City of Chewelah's Public Participation Program is in partial compliance with the Growth Management Act. The Board also finds the City of Chewelah's Public Participation Program in partial non-compliance as addressed in the Conclusion section of this Order.
 2. As to Issue No. 4 in this matter, Petitioner did not brief this issue and the Board finds Issue No. 4 is abandoned.
 3. The City of Chewelah must take the appropriate legislative action to bring themselves into compliance with this Order by **February 28, 2005, 60-days** from the date issued.
 4. The City shall file with the Board **by March 7, 2005, an original and four copies** a Statement of Action Take to Comply (SATC) with the GMA, as interpreted and set forth in this FDO. The SATC shall attach copies of legislation enacted in order to comply. The City shall simultaneously serve a copy to the SATC, with attachments, on the Petitioner. By this same date, the City shall file a "Remand Index," listing the procedures and materials considered in taking the remand action.
 5. By no later than **March 21, 2005**, the Petitioner shall file with the Board an **original and four copies** of Comments and legal arguments on the City's SATC. Petitioner shall simultaneously serve a copy of its Comments and legal arguments on the City.
 6. By no later than **April 4, 2005**, the City shall file with the Board an **original and four copies** of the City's Response to Comments and legal arguments. The City shall simultaneously serve a copy of such Response on Petitioner.
 7. By no later than **April 11, 2005**, the Petitioner shall file with the Board an **original and four copies** of their Reply to Comments and legal arguments. The Petitioner shall serve a copy of its brief on the City.

1
2 8. Pursuant to RCW 36.70A.330(1) the Board hereby schedules the
3 **Compliance Hearing** in this matter for **April 18, 2005, at 10:00**
4 **a.m., 301 E. Clay, Chewelah, WA.** With the consent of the parties,
5 the compliance hearing may be conducted telephonically.

6 If the City takes legislative compliance actions prior to the date set forth in this
7 Order, it may file a motion with the Board requesting an adjustment to this compliance
8 schedule.

9 **Pursuant to RCW 36.70A.300(5), this is a Final Order for purposes of**
10 **appeal. Pursuant to WAC 242-02-832, a Motion for Reconsideration may be filed**
11 **within ten (10) days of service of this Final Decision and Order.**

12 **SO ORDERED** this 27th day of December 2004.

13 EASTERN WASHINGTON GROWTH MANAGEMENT
14 HEARINGS BOARD

15 _____
16 Judy Wall, Board Member

17 _____
18 John Roskelley, Board Member

19 _____
20 Dennis Dellwo, Board Member